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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE DION GISPANSKI,

Defendant and Appellant.

E055750

(Super.Ct.No. RIF140862)

OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine,
Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Kyle Dion Gispanski was convicted after a jury trial of attempted murder (with enhancements), shooting at an occupied vehicle, and four counts of assault with a semiautomatic firearm. In his first appeal, defendant raised the single contention that the trial court had abused its discretion in denying a defense request for a

continuance at sentencing: defense counsel had not had time to read the probation report, and needed to investigate a new ground, possible juror misconduct. We reversed with directions to permit defendant to investigate the issue of juror misconduct as a possible additional ground for new trial. After remittitur, defense counsel conducted the investigation and filed a second motion for new trial, raising both the grounds already raised and the juror misconduct issue. The trial court denied the renewed motion for a new trial, and defendant appeals for a second time.¹ We affirm.

FACTS AND PROCEDURAL HISTORY

In December 2007, defendant and some friends spent the evening in a bar. Defendant and his friends left when the bar closed at approximately 2:00 a.m. The victim was also leaving the bar at the same time with friends of his own. In the parking lot, one of defendant's friends confronted the victim and it appeared an argument would ensue. Defendant persuaded his friend to desist. Defendant and another friend got into defendant's car; the victim and his three companions got into the victim's truck. The man who had confronted the victim left separately.

The accounts at trial differed as to what happened next, but according to the victim, as both vehicles proceeded along the street, defendant swerved toward and attempted to cut off the victim's truck, nearly causing an accident. The victim pulled into a nearby parking lot and stopped. Defendant followed. Defendant retrieved a gun from the glove box, loaded it with bullets from the center console, put the gun in his pocket,

¹ On the court's own motion, we take judicial notice of the record in the prior appeal, case No. E049919.

and then got out and walked over to confront the victim. Defendant indicated to the victim to roll down the driver's side window, and made some angry remarks to the effect that the victim should not "mess with" him, that they "d[id]n't know who you're f***ing with," and threats to "take you all out," and to "end you." The victim started to drive away, but defendant fired his gun; the bullet traveled through the victim's left eye and nose, and went through the windshield. The victim lost his eye as a result of the shooting.

Defendant's version was the victim had swerved his truck at defendant several times before both vehicles stopped in a shopping center parking lot. Defendant did load his gun and place it in his pocket before he went over to the victim. Defendant told the victim to "let it go" and to leave. Defendant claimed that the victim then slapped defendant across the face and began to drive away. Defendant "just reacted," and fired one shot at the fleeing vehicle, intending only to scare the occupants. A friend who was riding with defendant testified that when the victim slapped defendant, defendant stumbled and the gun went off.

Defendant was charged with one count of willful, deliberate and premeditated attempted murder, one count of shooting a firearm at an occupied vehicle, and four counts of assault with a semiautomatic firearm. The jury found defendant guilty on all counts, and found true the enhancement allegations (great bodily injury on the victim, personal use of a firearm as to all four assault victims).

Defendant filed a motion for a new trial shortly before sentencing. The motion asserted instructional error and other grounds. Three days before the scheduled hearing,

defense counsel also requested a continuance. The request was based in part on some new information that defense counsel had obtained, which suggested that one of the jurors had a communication with a defense witness during a break in the trial. The request was also based in part on the absence of a probation report, which had not yet been completed.

At the hearing itself, defense counsel stated that he had just received the probation report and had not yet had an opportunity to review it. The court pressed counsel to read the report, while at the same time it continued to discuss matters with the prosecutor. The court also indicated that no motion for a continuance was in the file, and it had neither received nor read the motion; the court did ascertain that the prosecutor had received a copy of the motion for a continuance, but nevertheless proceeded to deny the motion. The court also denied the motion for new trial. The court thereupon pronounced the sentence.

Defendant appealed, raising the issue that the trial court had abused its discretion in denying defendant's motion for a continuance: first, the court denied the motion without reading or considering it; second, defense counsel needed a continuance, both to investigate and decide whether to pursue the issue of juror misconduct as a ground for a new trial motion, and to properly review and respond to the probation sentencing report. We agreed with defendant that the trial court had abused its discretion in these particulars.

We reversed the judgment and remanded with directions, "to permit defense counsel to investigate the ground of juror misconduct, and to determine whether to bring

a new trial motion on that ground. If no new trial motion is brought timely, or if it is denied, then the judgment may be reinstated, upon proper determination and correct calculation of any victim restitution orders, custody credits, or other matters pertaining to sentencing.”

Upon remittitur from this court, defense counsel in the trial court pursued a motion for release of juror contact information, for the purpose of investigating the claim of juror misconduct. Further information that had been obtained through investigation indicated that a particular juror had, during the trial, been observed in the hallway at the courthouse speaking to a person who had been named as a defense witness. Eventually, the trial court permitted defense counsel to contact most of the jurors, or at least any of the male jurors who did not object, because the juror accused of potential misconduct had been identified as a male.

Defense counsel undertook an investigation and discovered that one juror, J.A., had a brief conversation with the defense witness. Counsel prepared and filed a motion for a new trial, including the ground of juror misconduct, as well as a repetition of all the issues raised in the earlier motion for a new trial. The new trial motion appended a declaration from the juror, stating: “1. During the trial, I had spoken to a potential witness in the hall outside of the court room, who I briefly spoke to, without knowing he was a potential witness in [defendant’s] trial, [and] whom I had known in the past.

“2. I had known a young man, who was killed in a traffic accident a few years before the trial. My wife and I . . . had known the young man’s family through Church activities. . . .

“3. When I saw the deceased man’s younger brother, I asked how his family was doing. I explained I had heard the deceased man’s younger brother had serious problems coping with the death and had ‘made some bad decisions’ after the death. When I saw and spoke with the deceased man’s brother, I was not aware the man was a potential witness, and just asked how his family was doing. The young man indicated they were doing well. I then got a bad feeling I was not supposed to be talking to the young man and I told him I was glad the family was doing well and ended the conversation.

“4. I never discussed anything about the trial and was not aware the young man was a potential witness. I never really knew the young man I spoke with, but was closer to his deceased brother. I didn’t think I had violated the Court’s instruction until I received a letter from the Court indicating the defense wanted to talk with the jurors and I thought that my conversation may have created a problem. I should have notified the Court of the brief conversation, but at the time I didn’t think anything of the conversation because I only asked how the young man’s family was doing, because I was concerned about them, and never discussed the trial with him.”

The People’s response to the motion for a new trial pointed out that the person to whom juror J.A. had spoken never testified at the trial; although he was a potential defense witness, he never actually testified for the defense. In addition, nothing in the evidence showed that the witness and the juror had discussed anything pertaining to the case. The People also objected to the court’s consideration of any of the original grounds for new trial, as that motion had been denied and no appeal filed as to that ruling.

The trial court denied defendant's renewed motion for new trial. Because of the language of the remittitur order, limiting the remand to an investigation and possible motion for a new trial on the previously unlitigated issue of juror misconduct and the failure to raise any of the new trial issues in the previous appeal, the trial court felt constrained to deny the motion as to any grounds raised in the original motion for a new trial. As to the new ground, juror misconduct, the trial court denied the motion because there was no showing that anything had been communicated that could have affected or did affect defendant's trial in any way. The conversation between the juror and the potential witness was very brief, and concerned matters having nothing to do with the trial. The juror did not know at the time that the witness was a potential witness in the case. Although the witness was a potential witness for the defense, he was never called to testify at the trial.

Defendant again appeals. Appointed appellate counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a statement of the case and a single potentially arguable issue: whether the trial court properly denied defendant's renewed motion for a new trial on the issue of juror misconduct. Appellate counsel has requested this court to undertake a review of the entire record. We now undertake this review.

ANALYSIS

I. Defendant Has Filed No Personal Supplemental Brief

We have invited defendant to file a personal supplemental brief to bring to the court's attention any matters that he believes may raise an appealable issue. Defendant has not filed a personal supplemental brief.

II. Independent Review of the Record Discloses No Arguable Issues

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the entire record independently, and have discovered no arguable issues. In the earlier appeal, even though the trial court had clearly denied defendant's motion for a new trial on all the grounds raised in the original motion, defendant failed to pursue any of those grounds as an issue on appeal. "[W]here a criminal defendant could have raised an issue in a prior appeal, the appellate court need not entertain the issue in a subsequent appeal absent a showing of justification for the delay." (*People v. Senior* (1995) 33 Cal.App.4th 531, 538.)

The directions given in our remittitur, with respect to new trial issues, were limited to an investigation and determination whether to bring a motion for a new trial on the ground of juror misconduct; the trial court's erroneous denial of a continuance to permit counsel the opportunity to investigate that issue, was a material reason for the remittitur and remand. No new trial motion beyond the scope of the remittitur was authorized. (See, e.g., *Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655, [an "action which does not conform to [the appellate court's] directions is void"]; *Karlsen v. Superior Court* (2006) 139 Cal.App.4th 1526, 1530, [where remittitur directed trial court to complete

statement of decision, judge exceeded jurisdiction by granting peremptory challenge motion]; *Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, [on remand, trial court had no jurisdiction to change prejudgment interest rate]; *Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982, [where remand instructed trial court to enter new default judgment based on evidence presented by plaintiffs at default prove-up hearing, it was improper for trial judge to take action leading to further trial court proceedings].)

The sole appellate issue suggested by appellate counsel is, as counsel opines, without arguable merit. A full, independent examination of the record in the case discloses no other arguable issues.

DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

RICHLI
J.

MILLER
J.